No. 81029-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

WASHINGTON STATE MAJOR LEAGUE BASEBALL STADIUM PUBLIC FACILITIES DISTRICT and THE BASEBALL CLUB OF SEATTLE, L.P.,

Appellants,

v.

HUBER, HUNT & NICHOLS-KIEWIT CONSTRUCTION, a Washington joint venture; HUNT CONSTRUCTION GROUP, INC., a foreign corporation; and KIEWIT CONSTRUCTION COMPANY, a foreign corporation,

Respondents.

RESPONSE OF THE PFD AND THE MARINERS TO AMICUS CURIAE BRIEF OF ASSOCIATED GENERAL CONTRACTORS

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I. INTRODUCTION

Washington long has been within the mainstream of states in holding that "a municipality acting in its delegated governmental capacity is generally not implied to be within the provisions of ordinary limitation statutes." 17 Eugene McQuillin, *The Law of Municipal Corporations* § 49:6, at 229-30 (3d ed. 2004 rev.). Nevertheless, the Associated General Contractors of Washington ("AGC") argues that this settled principle should not apply to construction of a publicly-owned stadium by the Washington State Major League Baseball Stadium Public Facilities District ("PFD"). Instead, the AGC asks this to Court hold that the PFD engaged in proprietary activity when it built Safeco Field to preserve major league baseball for the State of Washington. In fact, the controlling cases (which the AGC does not cite) make clear that this project has ***none*** of the earmarks of proprietary municipal activity. The Court should reject the AGC's argument, and reverse the trial court, for two reasons:

First, the AGC misunderstands *CLEAN v. State*, 130 Wn.2d 782, 804-05, 928 P.2d 1054 (1996), as well as the prior jurisprudence on this issue. In *CLEAN*, this Court held that construction of this ballpark fell within the State's police power. Under settled authority, that means the PFD carried out delegated State sovereign power when it constructed Safeco Field. And even if *CLEAN* had never ruled on this issue, the result would be same. Under settled law, a municipality engages in proprietary activity when it carries out activities (usually the provision of day-to-day

services) for the parochial benefit of its constituents or ratepayers. When it built this stadium, however, the PFD advanced the public welfare of the State as a whole, as the Legislature found (and this Court affirmed). For that reason, construction of Safeco Field was governmental activity, not proprietary, and the statute of limitations does not apply.

Second, the Court should not be deterred by the AGC's exaggerated predictions about what will happen if the Court finds this project to be governmental, not proprietary. Contrary to the AGC's concerns, a ruling that the PFD engaged in delegated sovereign activity will preserve, not blur, the settled distinction between sovereign and proprietary functions for purposes of RCW 4.16.160. Nor will a ruling in favor of the PFD and the Mariners expose general contractors to unmanageable subcontract risks: general contractors can contract around those risks – and HK claims it has done so here. Finally, the AGC has no basis for its forecast that a ruling against HK will increase the cost of public works. Contractors long have known that limitations periods do not govern claims asserted by municipalities in their governmental capacities; the AGC has not provided any reason to believe that contractor liability insurance in Washington costs one penny more as a result – or that it will increase if the PFD can proceed against its prime contractor (to which it paid hundreds of millions of dollars) for defective construction.

II. ARGUMENT

A. The AGC Misunderstands *CLEAN* and the Settled Law Concerning the Scope of RCW 4.16.160.

The AGC attacks the PFD's and the Mariners' straightforward reading of *CLEAN v. State*, 130 Wn.2d 782, 804-05, 928 P.2d 1054 (1996). AGC Br. at 5-11. In fact, the AGC fundamentally misunderstands the nature of the issue presented in *CLEAN*, and this Court's resolution of the issue. Further, even if *CLEAN* did not exist, prior case law concerning the dual nature of municipal functions makes clear that the PFD engaged in governmental, not proprietary, functions when it built Safeco Field.

1. This Court in *CLEAN* Decided that Construction of a Major League Baseball Stadium Fell within the State's Police Power.

The AGC asserts that the PFD and the Mariners rely on "dicta" from *CLEAN* to argue that construction of a major league baseball stadium was a proper exercise of sovereign police power. *See* AGC Br. at 6-7. In fact, an understanding of the context in which the Court decided *CLEAN* shows that the Court squarely decided that issue.

In *CLEAN*, a citizens' group challenged the Stadium Act's emergency provision, arguing that the statute was "not necessary for the immediate preservation of the public peace, health or safety" and thus did not qualify as a legitimate exercise of the State's police power to address an imminent threat. *See CLEAN*, 130 Wn.2d at 803. In rejecting that argument, the Court in *CLEAN* engaged in a two-step inquiry. The Court began by explaining that it had interpreted acts to protect "'public peace,

health or safety'" "as being synonymous with an exercise of the State's 'police power.'" *Id.* at 804. The Court summarized the State's explanation of why "the Stadium Act [was] a proper exercise of the State's police power," noting the State's claim that "the existence of a major league baseball team in King County provides jobs, stimulates the economy of King County and the state, provides recreational activities for all citizens of the state as well as visitors, and contributes positively to the fabric of the community at large." *Id.* at 805. The Court found ample evidence in the legislative record to show that major league baseball provided a benefit to "the state's economy" as well as "the economy of the region." *Id.* at 805-06. The Court also relied on the Governor's "testimony before the committees of the Legislature, describing how the economy of the state and the quality of life of its citizens [are] enhanced by the presence of a major league baseball team." *Id.* at 806.

Based on those assessments, the Court ***held*** that "it is certainly within the general police power of the State to construct a publicly owned stadium in order to promote those interests." *CLEAN*, 113 Wn.2d at 806. Having so held, the Court then turned to the second part of its inquiry, i.e., the "more knotty" question of whether the Stadium Act addressed an emergency and was necessary for the "'immediate' preservation of the public peace, health or safety." *Id.* at 807. The Court's conclusion that "it is certainly within the general police power of the State to construct a publicly owned stadium" therefore provided the first (and necessary)

element for the Court's rejection of CLEAN's attack on the emergency clause. It was a holding of the case, not a mere musing.

Faced with this, the AGC admits (as it surely must) that the ***passage*** of the Stadium Act "was a valid exercise of the State's police power," but argues that actually ***implementing*** the powers conferred by the Stadium Act would ***not*** be an exercise of police power. *See* AGC Br. at 4. This is absurd. In considering whether the Stadium Act furthered "public peace, health or safety," the Court did not engage in an antiseptic assessment of the legislative process, divorced from the Stadium Act's ultimate purpose. To the contrary, the Court decided that the Act satisfied the constitutional test for avoiding a referendum based on the ultimate "purpose of the legislation," i.e., "preserv[ing] the baseball franchise for the state of Washington" through construction of a new stadium. *CLEAN*, 130 Wn.2d at 809. Thus, when opponents challenged the emergency clause in legislation authorizing a vote on a new stadium for the Seattle Seahawks, this Court relied on *CLEAN* as holding "that construction of a major public sports stadium is a proper exercise of the State's police power." *Brower v. State*, 137 Wn.2d 44, 72-73, 969 P.2d 42 (1998).

It does not matter that the Legislature chose to implement its public purpose by prescribing a framework for the formation of the PFD and putting state financial resources at its disposal. Indeed, that reflects the usual manner through which the State ***delegates*** its sovereign power to a municipality. "The Legislature has properly delegated authority to a

local municipal corporation [i.e., the PFD] to carry out a legislative determination." *King County v. Taxpayers of King County*, 133 Wn.2d 584, 606, 949 P.2d 1260 (1997). When the PFD carried out the State's objectives through the construction of Safeco Field, it accomplished the public purpose that the Legislature sought to further through the Stadium Act – the preservation of a major league baseball franchise in the state, with all of its attendant statewide and regional benefits. *See CLEAN*, 130 Wn.2d at 809 (describing purposes). This Court therefore has held that the construction of Safeco Field fell within the State's police power.

2. *CLEAN* Establishes that the PFD Did Not Act in a Proprietary Capacity in Building Safeco Field.

The AGC next makes a confusing argument that the mere fact that the PFD exercised police power when it built Safeco Field does not necessarily mean that it exercised a "delegated sovereign power" so as to fall outside the scope of the statute of limitations. AGC Br. at 8-9. In so arguing, the AGC ignores the necessary implications of *CLEAN*.

In deciding whether the statute of limitations applies to a municipality's claim, a court must categorize municipal action as either governmental or proprietary:

> The ***only*** inquiry is whether the municipal action arises from an exercise of powers traceable to delegated sovereign powers of the state ***or*** whether such action arises from an exercise of proprietary powers.

Washington Pub. Power Supply Sys. v. Gen. Elec. Co., 113 Wn.2d 288, 296, 778 P.2d 1047 (1989) ("*WPPSS*") (emphasis added). Put in terms of

this case, the Court must decide whether the PFD, in contracting with HK to construct a publicly-owned baseball stadium pursuant to the Stadium Act for more than $200 million in public funds, engaged in "an exercise of delegated sovereign powers of the state, or whether it was an exercise of proprietary municipal power for the special or peculiar advantage of its own members." *WPPSS*, 113 Wn.2d at 296.

CLEAN settled that issue: it held that construction of this ballpark fell within the police power. In contrast to proprietary activities, the police power encompasses "the inherent and plenary power of a sovereign." *Black's Law Dictionary* 1196 (8th ed. 2004). Washington law recognizes the police power as the most fundamental of governmental powers, sharply distinct from "[a]uthority to act in a proprietary capacity, usually in connection with the sale of services or commodities through a utility." Hugh D. Spitzer, *Municipal Power in Washington State*, 75 WASH. L. REV. 495, 496-97 (2000).

In short, when this Court determined in *CLEAN* that construction of Safeco Field fell within the police power, that meant the activity could ***not*** possibly have been proprietary in nature. That answers "[t]he only inquiry" deemed relevant under *WPPSS*. *See* 113 Wn.2d at 296.[1]

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[1] HK also has raised an issue as to whether a recovery here will "benefit" the state, in the sense of having a positive financial impact on the PFD. But the PFD and the Mariners fully addressed that issue in their Reply Brief, Reply at 15-22, and the AGC does not contest the point in its *amicus curiae* brief. In fact, as Justice Dolliver made clear in *WPPSS*, "the 'for the benefit of the state' language in RCW 4.16.160 is properly understood to refer to the character or nature of the municipal conduct," rather than the ultimate effect

3. Longstanding Precedent Establishes that the PFD Did Not Act in a Proprietary Capacity.

Even if the Court had never decided *CLEAN*, the result here would be the same. Proprietary activity refers to municipal conduct that does not have broad state purposes, but instead

> regulates and administers the ***local and internal*** affairs of the territory which is incorporated, for the ***special benefit*** and advantage of the urban community embraced within the boundaries of the municipal corporation ...

City of Moses Lake v. United States, 430 F. Supp. 2d 1164, 1171-72 (E.D. Wash. 2006) (emphasis added) (citing *WPPSS*, 113 Wn.2d at 295-96). Thus, the cases routinely hold that a municipality engages in proprietary activity when it operates a municipal water system, *Moses Lake*, 430 F. Supp. 2d at 1177-78; *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951), sewer facilities, *City of Algona v. City of Pacific*, 35 Wn. App. 517, 520, 667 P.2d 1124 (1983), garbage collection systems, *Hutton v. Martin*, 41 Wn.2d 780, 786, 252 P.2d 581 (1953), and electric power facilities, *WPPSS*, 113 Wn.2d at 300-01. These functions amount to "either a private business or a proprietary municipal function for the advantage of each community." *WPPSS*, 113 Wn.2d at 301 (citing *Hite v.*

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of the action. *WPPSS*, 113 Wn.2d at 296. For that reason, when a State officer brings an action that vindicates "the public interest," the statute of limitations will not govern, even if the action will benefit a private party financially. *Herrmann v. Cissna*, 82 Wn.2d 1, 5-6, 507 P.2d 144 (1973) (action by Insurance Commissioner held to be "for the benefit of the state" even though all recoveries would benefit policyholders and shareholders of company in receivership).

PUD No. 2, 112 Wn.2d 456, 459, 772 P.2d 481 (1989)). Municipalities operate like private businesses when they carry out these functions, charging their ratepayers market prices for the services they provide.

But the conduct at issue here does not involve "the local and internal affairs" within the PFD's jurisdiction or work "for the special benefit and advantage" of some narrow constituency. *Moses Lake*, 430 F. Supp. 2d at 1171-72. Instead, the Legislature determined that major league baseball "improves the economy of ***the state*** ... and enhances the fabric of life of its citizens." *CLEAN*, 130 Wn.2d at 806 (emphasis added). The purpose of the Stadium Act and the stadium transcended local, proprietary concerns. Put in terms of the governing test, the PFD constructed Safeco Field "to promote the public welfare generally," not for the "special benefit and advantage of the urban community embraced within" Seattle or King County. *See WPPSS*, 113 Wn.2d at 295-96 (quoting 1 Eugene McQuillin, *The Law of Municipal Corporations* § 2.09, at 165 (3d ed. 1987)).[2] That being the case, when the PFD constructed

[2] The Court's more recent cases continue to emphasize that a governmental function is one performed "for the common good of all" whereas a proprietary activity is "for the special benefit or profit of the corporate entity." *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.3d 1279 (2003). And once an activity has been found to be for the common good and thus governmental for one purpose, as this Court in *CLEAN* found development of the ballpark to be traceable to the state's sovereign power, it cannot be proprietary for another purpose. *Okeson*, 150 Wn.2d at 551 ("Providing streetlights cannot be proprietary function for some purposes, but a governmental function for others."). *See also Branson v. Port of Seattle*, 152 Wn.2d 862, 870, 101 P.3d 67 (2004) (applying same standard for distinguishing between governmental and proprietary acts to determine municipality's scope of authority).

Safeco Field, it "assist[ed] in the government of the state as an agent of the state" rather than acting in a proprietary capacity. *See id.*

This result comports with past decisions, which the AGC does not cite or discuss. This Court long has held that the construction and operation of municipal facilities for recreational and entertainment purposes amounts to a governmental function, not a proprietary activity. The operation of city parks, swimming pools, and municipal playgrounds has been treated as a "governmental function." *Port of Seattle v. Int'l Longshoremen's &Warehousemen's Union*, 52 Wn.2d 317, 322, 324 P.2d 1099 (1958) (citing *Kilbourn v. City of Seattle*, 43 Wn.2d 373, 261 P.2d 407 (1953); *Mola v. Metro. Park Dist.*, 181 Wash. 177, 42 P.2d 435 (1935); *Stuver v. City of Auburn*, 171 Wash. 76, 17 P.2d 614 (1932)).[3] The fact that, in this instance, the municipality leased the entertainment facility to a private entity has no impact on the analysis. *See Louisiana-Pacific Corp. v. ASARCO Inc.*, 24 F.3d 1565, 1582 (9th Cir. 1994) (port

[3] Although this Court first addressed municipal stadiums in *CLEAN*, the characterization of stadiums as a governmental concern has deep historical roots. "Stadiums were constructed in Greece 600 years before the Christian era. Rome in the zenith of her power not only constructed the Coliseum at Rome, but caused similar structures to be erected and maintained in various large cities of the empire for the entertainment and edification of the public." *Meyer v. Cleveland*, 171 N.E. 606, 607 (Ohio Ct. App. 1930). Thus, like Washington, "the overwhelming majority of courts from other jurisdictions confronting this issue have determined that construction of a publicly owned stadium to be leased to professional sports teams serves a public purpose." *CLEAN*, 130 Wn.2d at 793; *see also Brower*, 137 Wn.2d at 73 (public vote on plan for new football stadium "itself concerns public sports stadium, also a public purpose").

exercised delegated sovereign power when it implemented state policy by developing and leasing logyards to private entities).

Applying the precedent to this case, when the PFD developed a recreational and entertainment facility for the benefit and enjoyment of the citizens of the State as a whole, and then leased the facility in furtherance of the public purpose, it exercised delegated sovereign power.

B. The AGC's Alarmist Concerns Cannot Withstand Scrutiny.

The AGC concludes its brief with three admonitions, warning the Court that the sky will fall if the Court holds that the PFD acted in a governmental capacity when it build Safeco Field. The Court can easily dispose of each of these straw-men:

First, the AGC contends that a decision in favor of the PFD and the Mariners would "swallow the rule" and expose general contractors to liability beyond the statute of limitations whenever any municipality undertakes action authorized by statute. AGC Br. at 8. This argument rests on the unfounded premise (for which the AGC does not cite any authority) that ***every*** statute that authorizes municipal action rests on the police power, as did the Stadium Act. AGC Br. at 9. But that is manifestly not the case, which is why this Court devoted three pages in *CLEAN* to assessing whether the Stadium Act actually addressed matters within the police power. *CLEAN*, 130 Wn.2d at 805-07.

In fact, the Legislature often acts to authorize proprietary activity. *See, e.g.*, *State ex rel. Robinson v. Reeves*, 17 Wn.2d 210, 217, 135 P.2d

75 (1943) (statute pertaining to acquisition of public power resources "is not an exercise of police power"), *overruled on other grounds by State ex rel. Hoppe v. Meyers*, 58 Wn.2d 320, 363 P.2d 121 (1961). For that reason, no matter how this case comes out, proprietary activity – including municipal utility functions – will remain subject to the same limitations periods that govern private business, as always has been the case. The decisions in *WPPSS* and *Moses Lake* make the point, holding that the statute of limitations applied to claims arising out of the proprietary functions of electrical power generation and water utilities. *See WPPSS*, 113 Wn.2d at 296; *Moses Lake*, 430 F. Supp. 2d at 1171-72. The results in those cases would not change if the Court were to reverse here.

Second, the AGC frets that a decision against HK may mean that general contractors will wind up "whipsawed between an owner whose claims have no time limit and subcontractors that have a complete bar." AGC Br. at 11. But this concern applies to ***every*** public project subject to the exception in RCW 4.16.160, and it therefore has nothing to do with this case. As even the AGC understands, contractors working for municipalities on projects that fulfill delegated state functions must assume that statutes of limitation will not limit claims against them. This is the rule across the nation, as a sophisticated contractor such as HK surely knew. 17 Eugene McQuillin, *The Law of Municipal Corporations* §49:6, at 229-30 ("a municipality acting in its delegated governmental

capacity is generally not implied to be within the provisions of ordinary limitation statutes").

As a result, no matter what happens in this case, general contractors must take steps to avoid the concern that the AGC identifies. And they have means at their disposal to do it, since (as the AGC says) "construction contracts are risk allocation devices that seek to assign the risk to the party best able to control it." AGC Br. at 11; *see also Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1*, 124 Wn.2d 816, 827, 881 P.2d 986 (1994) (maintaining strict boundary between contract and tort remedies provides "incentive" for industry to "self-protect" through contract negotiation).[4] Because general contractors possess negotiation leverage over subcontractors, they can (if necessary) modify contract forms to avoid the alleged "whipsaw" effect that worries the AGC. *Yakima Asphalt Paving Co. v. Washington State Dep't of Transp.*, 45 Wn. App. 663, 665-66, 726 P.2d 1021 (1986) (upholding the validity of contractual limitation period in construction contract).

Third, the AGC warns that a ruling in favor of the PFD will increase the cost of public works. AGC Br. at 12-13. But the exception to

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[4] As HK points out, subcontractors are routinely bound to general contractors to the same extent general contractors are bound to owners under "flow down" and indemnity clauses. *See* Reply Br. of Cross-Appellants at 3-5. Moreover, this Court construes the indemnification clauses in subcontracts to protect general contractors from liabilities to owners relating to subcontract work. *Brown v. Prime Constr. Co.*, 102 Wn.2d 235, 241-42, 684 P.2d 73 (1984). In any event, none of these issues is before the Court on this case, which involves only the claims between the owner, the PFD, and HK.

the limitations period set forth in RCW 4.16.160 has been a part of the Washington legal landscape for decades, just as a similar rule has long prevailed in other states. The AGC has not pointed to any evidence suggesting that the principles embodied in the statute have inhibited Washington's robust construction industry (or the construction industry in any other state), deterred any contractor from securing the liability insurance necessary to cover claims on public works, or increased the cost of any project by a nickel. In contrast, one can be sure that allowing contractors to escape liability for defective work on public projects based on the limitations period (as HK urges here) will result in the public bearing expense that properly should be borne by contractors.

A ruling that the PFD here acted pursuant to delegated state authority will not send shock waves through the industry – especially given that the ruling in *CLEAN*, holding that construction of the stadium fell within the state's police power, enabled HK to secure a contract worth over $200 million. Existing precedent, with which the industry has long been familiar, compels the conclusion that the PFD exercised delegated sovereign power when it constructed Safeco Field.

III. CONCLUSION

For these reasons, and for the reasons stated in prior briefing, the Court should reverse the trial court's decision and reinstate the PFD's and the Mariners' claims.

Dated this 12th day of March, 2008.

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PROOF OF SERVICE

I hereby certify that on the 12th day of March, 2008, I mailed a true and correct copy of the Response of the PFD and the Mariners to Amicus Curiae Brief of Associated General Contractors to counsel of record at the following addresses by depositing the envelopes in regularly maintained interoffice mail. This mail is collected and deposited with the United States Postal Service on the same day it is deposited in interoffice mail, postage thereon being fully prepaid:

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EXECUTED at Seattle, Washington this 12th day of March, 2008.

Cindy Bourne

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Thanks for your cooperation.

Regards,

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